

Mohammed (Migration) [2021] AATA 325 (7 January 2021)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Samiuddin Khan Mohammed
CASE NUMBER:	1724061
DIBP REFERENCE(S):	CLF2013/32211 CLF2017/73364
MEMBER:	Stephen Conwell
DATE:	7 January 2021
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa: • cl.801.221(2)(c) of Schedule 2 to the Regulations.

Statement made on 07 January 2021 at 11:46am

CATCHWORDS

MIGRATION – Partner (Residence) (Class BS) visa – Subclass 801 (Partner) – genuine spouse – 3 years since department refusal – shared household, expenses – mutual emotional and practical support – decision under review remitted

LEGISLATION

Migration Act 1958, ss 5F, 65

Migration Regulations 1994, Schedule 2, cl 801.221(2)

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 22 September 2017 to refuse to grant the applicant a Partner (Residence) (Class BS) visa under s.65 of the Migration Act 1958 (the Act).
2. The applicant applied for the visa on 18 February 2013 on the basis of his relationship with his sponsor, Ms Laila Eldimerdash. At that time, Class BS contained only one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.801.221(2) because the delegate was not satisfied the applicant was the spouse of the sponsor.
4. The applicant provided a copy of the delegate's decision to the Tribunal for the purposes of the review.
5. The hearing was held during the coronavirus (COVID-19) pandemic. Having regard to the nature of the review, and the objectives of the Tribunal to provide a mechanism of review that is just, fair, economical and quick, the Tribunal determined that it was appropriate that this review be conducted in person with health and safety modifications made in accordance with government public health advice. The applicant appeared before the Tribunal on 16 December 2020 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor, the sponsor's mother, Mrs Hoda Tawfik, and the sponsor's step-father, Mr Diaa Abdulla.
6. The applicant was represented in relation to the review by his registered migration agent, who also attended the hearing.
7. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The issue in the present case is whether the parties are in a genuine and continuing spousal or de facto relationship and otherwise meet the definition of spouse or de facto partner found in the Act.

Whether the parties are in a spouse or de facto relationship

9. Relevantly to this matter, cl.801.221(2)(c) requires that at the time of this decision, the applicant is the spouse of the 'sponsoring partner', who must be an Australian citizen or Australian permanent resident or an eligible New Zealand citizen who was specified in the related Subclass 820 visa application as the spouse or de facto partner of the applicant. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen and was identified in the Subclass 820 visa application. On the evidence before it, the Tribunal is satisfied that the sponsor is the 'sponsoring partner' of the applicant.
10. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a) - (d). In forming an opinion

about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and sponsor's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

11. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. A marriage certificate evidencing a marriage on 7 January 2013 is on the Department and Tribunal files. On the evidence, the Tribunal finds the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

12. *Site visit to the applicant's family's home in India – May 2017*

13. As noted in the decision record the delegate gave adverse weight to the Department's findings from a site visit on 18 May 2017 to the applicant's family's home in India. The Department file contains a report of that home site visit. During that visit the applicant's parents, his siblings, his step-mother and certain uncles were interviewed. According to the decision record, the interviewees claimed that the applicant was not married and/or lacked awareness of the applicant's personal circumstances in Australia. Furthermore, the delegate notes the concern that certain family members appeared to be assisting others with their responses during the site visit. Departmental records also note that the applicant visited India on two occasions without his sponsor.
14. The applicant responded to this adverse information by written submissions to the Department on 14 August and 17 August 2017. The submissions included Form 888 statements from the sponsor's family members in support of his application for the subclass 801 visa. The submissions also included statutory declarations by the applicant, in which he explained that he communicates mainly with his mother and sister, Mahe Jabeen; that there was friction between the applicant's mother and his father's other wife, (the applicant's step-mother), which may have motivated his step-mother and some of the applicant's siblings to provide misleading information during the site visit. The applicant also stated that one of the persons identified as his uncle during the site visit, was not in fact a relative, but was rather, an older friend of the family, who, as is customary in Indian culture, is often referred to as, 'uncle'.
15. With regard to the sponsor not accompanying the applicant on two return visits to India he stated that having three school-age children at the time, made it difficult for the sponsor to join him during those visits.
16. The findings of the site visit led the delegate to conclude that the parties had failed to demonstrate to the applicant's family and community in India that they a married couple in a genuine spousal relationship.
17. The Tribunal has reviewed this evidence including the Department's home visit report, the decision record and the submissions and evidence from the applicant and his representative. In the course of the hearing the Tribunal has also had the advantage of hearing oral evidence from the applicant, the sponsor and the sponsor's mother and step-father. The Tribunal found the applicant, the sponsor and the witnesses to be honest and credible in their testimony. Consequently the Tribunal has reached different conclusions from the delegate, based on submissions and evidence provided since the delegate's decision, and upon the oral evidence provided at hearing.
18. The Tribunal notes that the hearing took place some three years since the delegate's decision; during this time the parties have remained a married couple and continue to parent

the sponsor's three children in the context of their family. The Tribunal is satisfied that the applicant and sponsor represent themselves as husband and wife to the sponsor's family, to their friends and work colleagues and to the wider community in Australia . Notwithstanding the adverse findings of the 2017 site visit, the Tribunal is satisfied that the applicant's family and relatives in India are aware of the applicant's and sponsor's continuing spousal relationship.

19. *Financial aspects of the relationship*

20. The Tribunal is satisfied that the parties do not jointly own major assets or jointly have significant liabilities. The parties and children continue to live in a property rented from a community co-operative. The Tribunal is satisfied neither of the parties owes any legal obligation in respect of the other. The Tribunal accepts the parties have joint liabilities in the sense of rent, a car loan and household utility bills; they each understand these liabilities and obligations to be their shared responsibilities. The Tribunal accepts the parties have a joint bank account to manage their household and daily expenses; the applicant also has a separate account for his work as a taxi/Uber driver.
21. The Tribunal accepts that at the start of the marriage the sponsor was a housewife, but with the applicant's encouragement and support, she commenced vocational studies to become a teacher's aide and she progressed from a casual position as a teacher's aide to a permanent full-time role. Consequently the sponsor in the past few years of full-time employment has been able to increase her financial contribution towards the family's savings and joint expenses.
22. The evidence of pooling of financial resources, and the limited joint liabilities, coupled with the strong evidence of sharing day-to-day household expenses, indicates that the parties are in a genuine and continuing spousal relationship.

23. *Nature of the Household*

24. The Tribunal is satisfied that the parties have shared the management of their household and the care of the three children and have resided at the same rental address for many years. It is apparent that the applicant has willingly assumed the role and obligations of a father to the three children. It was at his encouragement and expense that the children took up swimming lessons. The written statements from the children make it abundantly clear that they love and respect the applicant and accept him as a father-figure in their lives. The Tribunal accepts the evidence of their living arrangements as husband and wife, with the three children completing the family. The Tribunal accepts the statutory declarations of several deponents which declare the couple's marriage and spousal relationship to be genuine and continuing.
25. The Tribunal accepts that the parties share the responsibilities of the housework and the many and varied obligations that arise from their shared life within their immediate and wider family circles. The evidence of the nature of the household provided to the Tribunal is consistent and indicates that the parties live together, and not separately and apart, on a permanent basis.

26. *Social aspects of the relationship*

27. The applicant provided the Tribunal with several statutory declarations from friends and family members attesting to the relationship. In addition there was evidence of the significant emotional and practical support the applicant has provided and continue to provide to the sponsor and the three children. It is clear that the applicant also provides assistance and emotional support to the sponsor's mother (who has on-going medical needs) and to her other relatives. It is clear that the applicant considers himself to be a part of the sponsor's wider family circle. The Tribunal was provided with many photos of the couple with and without the children in many social settings, and with the sponsor's relatives. The Tribunal

accepts the photographs, letters and statutory declarations as genuine and illustrative of the applicant's role as husband to the sponsor and father-figure to her three children.

28. The Tribunal is satisfied that the applicant and sponsor represent themselves to other people in their family, and to the wider community as being married to each other. The Tribunal is satisfied that the opinion of the parties' friends and acquaintances is that the relationship is genuine, long-standing and supportive. The Tribunal is satisfied that the parties plan and undertake joint social activities around their commitment to each other, to the children and within the context of their wider family group.
29. The evidence of the social aspects of the relationship confirms that the parties are in a genuine and continuing relationship and have a mutual commitment to a shared life as husband and wife to the exclusion of all others.

30. *Nature of the persons' commitment to each other*

31. The Tribunal is satisfied that the parties were married on 7 January 2013 and have lived together from that date. The Tribunal is satisfied as to the genuineness of the marital relationship, noting that the length of time the parties have lived together is some eight years at the time of this decision. As previously noted, it was the applicant's encouragement and support which persuaded the sponsor to commence vocational studies to become a teacher's aide, which the sponsor acknowledged at hearing. The Tribunal is satisfied that the applicant and sponsor provide each other with companionship, friendship and support. The Tribunal is satisfied that the applicant and sponsor see the relationship as a long-term one.
32. Having considered all the matters set out in r.1.15A(3)(a), (b), (c) and (d), the Tribunal is satisfied that the applicant and sponsor are in a spousal relationship within the meaning of s.5F(2)(b)-(d). The Tribunal is satisfied that the applicant and the sponsor have a mutual commitment to shared life as husband and wife to the exclusion of others, that they are in a genuine and continuing relationship, and that they live together, and not separately and apart, on a permanent basis.
33. Given these findings the Tribunal is satisfied that the requirements of s.5F(2) are met at the time of this decision. Therefore, the Tribunal is satisfied that at the time of decision, the applicant is the spouse of the sponsoring partner, and meets the requirements of cl.801.221(2)(c).
34. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 801 visa.

DECISION

35. The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa:
 - cl.801.221(2)(c) of Schedule 2 to the Regulations.

Stephen Conwell
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).